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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR 6543

DATE COMPLAINT FILED: March 23, 2012

DATE ACTIVATED: May 22, 2012

EXPIRATION OF SOL: March 3, 2017

COMPLAINANT:

Thomas R. Hawk

RESPONDENTS:

Unknown Respondents

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 434

2 U.S.C. § 441d

11 C.F.R. § 100.22

11 C.F.R. § 100.26

11 C.F.R. § 100.28

11 C.F.R. § 109.10

11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure reports

FEDERAL AGENCIES CHECKED:

I. INTRODUCTION

This matter involves allegations that unknown persons or entities made automated pre-recorded telephone calls ("robocalls") to voters in the 10th Congressional District of North Carolina without required disclaimers in violation of the Federal Election Campaign Act of 1971, as amended, (the "Act") and Commission regulations. See 2 U.S.C. § 441d; 11 C.F.R. § 110.11. The robocalls played a message that expressly advocated the defeat of Representative Patrick

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McHenry, the incumbent and a candidate in the May 8, 2012, primary election, without identifying who was responsible for the calls.

For the reasons discussed below, we recommend that the Commission: (1) find reason to believe that one or more unknown respondents violated 2 U.S.C. § 441d by failing to include a proper disclaimer in the robocalls; (2) find reason to believe that one or more unknown respondents violated 2 U.S.C. § 434 by failing to report the expenditures related to the robocalls; and (3) authorize the use of compulsory process in this matter, including the issuance of appropriate interrogatories and document subpoenas, as necessary, to determine the identity of the unknown respondents and to ascertain the cost, timing, and number of the robocalls made.

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

The Complainant alleges that on March 3, 2012, he received a recorded message on his home answering machine with the following message:²

Hello, this is Betty, one of your neighbors. I'm calling to share some thoughts about voting on May 8th of this year. Let me tell you, I'm a Republican and my husband John is an Independent, and we agree on one thing - - *what are we doing sending Congressman McHenry back to Washington? McHenry is not one of us.* McHenry's politics and personal life style is going to blow up in our face sooner or later. Remember Delay from Texas, Foley from Florida, and Senator Craig from Idaho. We are also voting for a marriage amendment in May and McHenry is not that kind of Conservative. McHenry is not one of us. Bye now.

Compl., Attach.

² The Complainant included a transcript of the call but not an audio recording, because, the complainant states, the quality of the audio recording of the message was poor. Compl. We plan to request a copy of the audio recording during our investigation.

1 According to the Complainant, his telephone preserved the number associated with the
2 robocall message (828-318-8543), and when he dialed the number, the same message was played.

3 *Id.*

4 Complainant does not know who was responsible for the robocalls, but speculates that Ken
5 Fortenberry may have been responsible because Fortenberry was McHenry's "only active primary
6 challenger." *Id.*³ Complainant further asserts that he has been informed that other voters in
7 counties within the district received the same robocalls. *Id.*

8 The robocalls were the subject of a newspaper article. See Frank Taylor, *Calls to Lincoln*
9 *Voters Appear Illegal*, LINCOLN TIMES-NEWS, Mar. 7, 2012, available at

10 <http://www.lincolntimesnews.com/?p=49249>.⁴ According to that news report, the robocalls were
11 made to Lincoln County voters, "drawing complaints and a possible state investigation, after the
12 [newspaper] brought the calls to the attention of the NC Department of Justice." *Id.* The article
13 also reported that the newspaper contacted the campaigns of the six candidates competing for the
14 10th Congressional District seat, and that they each denied any involvement with the robocalls.

15 *Id.*

16 We found no record of a public listing for the person or entity associated with the
17 telephone number identified in the Complaint, but an online subscription database identifies the
18 service provider with which that number is apparently registered as Level 3 Communications,
19 LLC-NC. The relevant Commission disclosure reports for the campaign committees of the six

³ When the robocalls were made, there were four other candidates in the race: Don Peterson, Terry Bellamy, Patricia Keever, and Timothy Murphy. See http://www.ballotpedia.org/wiki/index.php/North_Carolina%27s_10th_congressional_district_elections_2012.

⁴ The Complainant is named in the Taylor article as one of several sources.

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1 candidates who participated in the 10th Congressional District primaries at the relevant time do
2 not reflect any disbursement, debt, or in-kind contribution related to Level 3 Communications.

3 **B. Legal Analysis**

4 1. The Robocalls Lack Required Disclaimers
5

6 The Act and Commission regulations require certain types of communications to include a
7 disclaimer notice. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11. A disclaimer is required "whenever
8 any person makes a disbursement for the purpose of financing [public] communications expressly
9 advocating the election or defeat of a clearly identified candidate." 2 U.S.C. § 441d(a); 11 C.F.R.
10 § 110.11(a)(2). The communication, if not authorized by a candidate, must clearly state the name
11 and permanent street address, telephone number, or World Wide Web address of the person who
12 paid for the communication and state that the communication is not authorized by any candidate or
13 candidate's committee. 2 U.S.C. § 441d(a)(3); 11 C.F.R. § 110.11(b)(3). If paid for or authorized
14 by a candidate, an authorized political committee, or its agents, the communication must also
15 clearly so state. 2 U.S.C. § 441d(a)(1); 11 C.F.R. § 110.11(b)(1).

16 A "public communication" includes a communication by "telephone bank to the general
17 public." 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. The "telephone bank" standard is satisfied
18 where "more than 500 calls of an identical or substantially similar nature were made within any
19 30-day period." 2 U.S.C. § 431(24); 11 C.F.R. § 100.28. Telephone calls are "substantially
20 similar" when they "include substantially the same template or language, but vary in non-material
21 respects such as communications customized by the recipient's name, occupation, or geographic
22 location." 11 C.F.R. § 100.28.

23 The robocalls at issue in this matter appear to meet "telephone bank to the general public"
24 standard and therefore constitute a "public communication." Although we do not know precisely

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1 how many robocalls were made, the available information and the allegations in the Complaint
2 provide reason to believe that the volume of substantially similar calls satisfies the 500-call
3 threshold for the telephone bank standard. The robocalls were allegedly made to multiple voters
4 in the 10th Congressional District, on or about March 3, 2012. *See* Compl. (asserting on
5 information and belief that “the same robo call was made to many voters here in Lincoln County
6 and the adjoining Gaston County”); Taylor, *supra* (describing complaints from multiple recipients
7 of the calls). As of January 1, 2012, the 10th Congressional District had over a half-million
8 registered voters. *See* <http://www.ncsbe.gov/content.aspx?id=41>. Given the number of registered
9 voters in the district, the one-day period in which the robocalls were reportedly made, the several
10 reported complaints about the robocalls, and the relative sophistication of the message and the
11 failure to reveal the source, there is ample reason to believe that the quantity and timing
12 requirements under the Act and Commission regulations are likely met. 2 U.S.C. § 431(24);
13 11 C.F.R. § 100.28.

14 If the robocalls were public communications expressly advocating the election or defeat of
15 a clearly identified candidate, they required a disclaimer. 11 C.F.R. § 110.11(a)(2). A
16 communication contains “express advocacy” when it uses phrases, campaign slogans, or
17 individual words “which in context can have no other reasonable meaning than to encourage the
18 election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers,
19 advertisements, etc. which say ‘Nixon’s the One,’ ‘Carter ’76,’ ‘Reagan/Bush’ or ‘Mondale!’”
20 11 C.F.R. § 100.22(a). Express advocacy also encompasses communications that contain “in
21 effect an explicit directive” to vote for or against a candidate. *FEC v. Mass. Citizens for Life, Inc.*,
22 479 U.S. 238, 249 (1986) (“*MCFL*”). The fact that a message is “marginally less direct than ‘Vote
23 for Smith’ does not change its essential nature.” *Id. see also* 11 C.F.R. § 100.22(b) (express

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1 advocacy includes communications that contain an "electoral portion" that is "unmistakable,
2 unambiguous, and suggestive of only one meaning" and about which "reasonable minds could not
3 differ as to whether it encourages actions to elect or defeat" a candidate).

4 The robocalls satisfy the express advocacy requirements under 11 C.F.R. § 100.22(a).
5 They use phrases that in context can have no reasonable meaning other than to urge the defeat of
6 McHenry. The robocalls indisputably concern voting in the May 8, 2012, primary election: the
7 caller states that she is "calling to share some thoughts about voting on May 8th this year." The
8 call further clearly identifies McHenry by name as the incumbent seeking re-election. The caller
9 claims she is a Republican and her spouse an Independent who "agree on one thing – what are we
10 doing sending Congressman McHenry back to Washington?" because "McHenry is not one of us."
11 and his "politics and personal life style is going to blow up in our face sooner or later." The
12 rhetorical question "what are we doing sending Congressman McHenry back to Washington?"
13 amounts to an explicit directive urging voters to defeat McHenry. *See MCFL*, 479 U.S at 249
14 (1986) ("[The publication] provides in effect an explicit directive: vote for these (named)
15 candidates. The fact that this message is marginally less direct than "Vote for Smith" does not
16 change its essential nature."); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 65 (D.D.C. 1999)
17 ("merely changing the verb 'vote' into the noun, 'trip to the voting booth' is insufficient to escape
18 the limited reach of express advocacy"). Nor does the fact that the robocall couches its
19 exhortation to defeat McHenry in terms of a rhetorical question alter its nature as express
20 advocacy. *See Factual & Legal Analysis* at 8, MUR 5831 (Softer Voices), (determining that "Can
21 we really risk Bob Casey learning on the job?" is express advocacy under 11 C.F.R. § 100.22(a)).

22 The robocalls did not identify who authorized or paid for them, and the available
23 information is insufficient to determine the original source. Consequently, an investigation is

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1 required to determine the responsible party and ascertain the cost, timing, and number of calls
2 made.⁵

3 Finally, because the Complainant provides a telephone number associated with the
4 robocalls, which allowed us to determine the identity of the service provider responsible for
5 placing the calls, there is a clear and straightforward lead from which to trace the source of the
6 robocalls. As such, this matter is readily distinguished from other matters in which the
7 Commission concluded through its summary dismissal practice that investigation would not likely
8 reveal the identity of the party responsible for the apparent violation.⁶

9 For the foregoing reasons, we recommend that the Commission find reason to believe that
10 unknown respondents violated 2 U.S.C. § 441d(a) by failing to include a disclaimer in the
11 robocalls advocating the defeat of a specifically identified federal candidate.

12 2. The Automated Calls Should Have Been Disclosed as Expenditures
13

14 As a direct consequence of finding reason to believe that the robocalls violate the
15 disclaimer requirements of the Act, there is reason to believe that the associated expenditures

⁵ In several recent MURs, the Commission was unable to agree to authorize investigation in cases in which the communications did not contain express advocacy. *See, e.g.*, MUR 6429 (Unknown Respondents) (Commission, by 2-3 vote, unable to approve recommendation to investigate bulk mailers and phone calls that did not contain express advocacy); MUR 6441 (Unknown Respondents) (same, by 3-3 vote, as to bulk mailers that did not contain express advocacy). In those cases, however, the responsible party was not required to include a disclaimer unless it was a political committee, and 3 Commissioners concluded that the factual allegations were inadequate to find reason to believe that a political committee was involved and, thus, that a disclaimer was required. Accordingly, those cases are inapposite here: the content of these robocalls contained express advocacy and, therefore, required a disclaimer regardless of the type of entity that paid for the communication.

⁶ *See, e.g.*, MUR 6135 (Unknown Respondents) (EPS) (dismissing for prosecutorial discretion where Office of General Counsel was unable to identify any individual associated with phone calls); MUR 5455 (Unknown in South Dakota) (EPS) ("[W]ithout the last four digits of the phone number where the calls emanated from it was unlikely that an investigation would ultimately reveal the source of the calls.").

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1 should have been disclosed as expenditures under 2 U.S.C. § 434(b).⁷ See MURs 6486, 6491
2 (Unknown Respondent) (ongoing matter). If an authorized committee was responsible for making
3 the calls, it should have disclosed the expenditures in reports filed with the Commission. See
4 2 U.S.C. § 434(b)(4). If an unauthorized political committee was responsible, it should have
5 disclosed expenses associated with the calls as independent expenditures and should have itemized
6 each independent expenditures which exceeds \$200, or which, when added to previous
7 independent expenditures made on behalf of (or in opposition to) the same candidate, aggregates
8 over \$200 during a calendar year. 2 U.S.C. § 434(b)(4)(H), (6)(B)(iii); 11 C.F.R. §§ 104.4;
9 109.10(a). A person other than a political committee, who makes independent expenditures in an
10 aggregate amount or value in excess of \$250 during a calendar year, must file a statement
11 disclosing information about the expenditures. 2 U.S.C. § 434(c)(1); 11 C.F.R. § 109.10(b)-(d).
12 The timing and frequency of independent expenditure reporting depends on the amount of the
13 expenditures and when they are made.⁸

14 In this instance, as described above, it appears reasonably likely that the calls cost more
15 than \$200. Accordingly, there is reason to believe that the associated payments should have been
16 disclosed as independent expenditures. And although this potential violation was not specifically
17 articulated by the Complainant, it flows directly and unavoidably from the nature of the
18 communication described in the complaint as express advocacy. Accordingly, we recommend that

⁷ The Act defines an independent expenditure as any expenditure that expressly advocates the election or defeat of a clearly identified candidate and is not made in concert with a candidate, a political party committee, or their respective agents. 2 U.S.C. § 431(17).

⁸ Independent expenditures aggregating \$1,000 or more made after the 20th day, but more than 24 hours before the day of an election, must be reported within 24 hours following the date on which the communication is publicly distributed or disseminated, 2 U.S.C. § 434(g)(1); 11 C.F.R. § 109.10(d), while those aggregating \$10,000 or more made at any time during a calendar year, up to and including the 20th day before an election, must be reported within 48 hours of the date of distribution or dissemination. 2 U.S.C. § 434(g)(2); 11 C.F.R. § 109.10(c).

the Commission find reason to believe that unknown respondents violated 2 U.S.C. § 434 by failing to disclose expenditures.

III. INVESTIGATION

We seek authorization to conduct a limited investigation to determine the identity of the unknown respondent, and to ascertain the cost, timing, and number of calls made. Although we will attempt to conduct the investigation informally, formal discovery may be necessary. Therefore, we recommend that the Commission authorize the use of compulsory process, including subpoenas for answers to written questions, production of documents, and depositions, as necessary.

IV. RECOMMENDATIONS

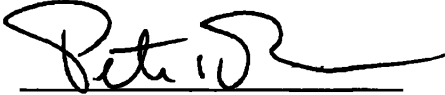
1. Find reason to believe Unknown Respondents violated 2 U.S.C. § 441d.
2. Find reason to believe Unknown Respondents violated 2 U.S.C. § 434.
3. Authorize the use of compulsory process in this matter, including the issuance of appropriate interrogatories, and document subpoenas, as necessary.
4. Approve the appropriate letters.

Anthony Herman
General Counsel

8/20/12
Date

BY:


Daniel A. Petalas
Associate General Counsel for Enforcement


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